Lu v. Mukasey, No. 04-76080

LEIGHTON, District Judge, dissenting.

This court is bound to review adverse credibility determinations for substantial evidence, and we should reverse only if our review of the record compels us to a conclusion contrary to that reached below. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483-84, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992); *Singh v. Gonzales*, 439 F.3d 1100, 1105 (9th Cir. 2006).

In this case, the IJ's adverse credibility finding is supported by numerous material inconsistencies that go to the heart of the petitioner's claim for asylum. The IJ identified many of these contradictions in her oral decision, and the BIA affirmed in a brief order,[1] agreeing with the outcome reached by the IJ, implicitly

[1] A BIA opinion may take one of three forms: (1) a *de novo* review and full explanation by a three-member panel, (2) a summary affirmance by a single member, or (3) a "brief order" by a single member. *Uanreroro v. Gonzales*, 443 F.3d 1197, 1203-04 (10th Cir. 2006); 8 C.F.R. § 1003.1(e)(4)-(6) (describing the three options). Where, as here, the BIA's order is drafted by a single member, but lacks the language of an affirmance without opinion, it is of the third, "brief order" variety. *See Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006).

Thus, contrary to the majority's assumption, the BIA's order in this case does not constitute *de novo* review; in fact, the BIA cannot and does not review credibility determinations *de novo*. 8 C.F.R. § 1003.1(d)(3)(i); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 448 (4th Cir. 2007); *Chen v. Bureau of Citizenship and Immigration Services*, 470 F.3d 509, 513 (2d Cir. 2006) ("[T]he BIA is no longer permitted to engage in de novo review of an IJ's factual findings.")

I believe that where the BIA utilizes a brief order and incorporates the IJ's

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incorporating her adverse credibility determination, and noting four specific inconsistencies in the petitioner's application that supported the IJ's original finding that the petitioner lacked credibility.

In reaching its desired result here, the majority discards the IJ's reasoning in its entirety, ignores the host of inconsistencies apparent in the record, acknowledges only the four discrepancies noted by the BIA in its brief order of affirmance, and deems the petitioner credible as a matter of law. Because I believe it is error to whisk away the IJ's original grounds for her adverse credibility determination, and because a review of the record reveals substantial and overwhelming evidence supporting that determination, I respectfully dissent.

The petitioner claims he was persecuted because he used his position of power and his place of employment to facilitate Falun Gong practice; thus, where he worked is central to his version of why he was persecuted and fled. Yet the

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credibility finding, we should continue to examine the IJ's reasons for deeming the applicant not credible. This common sense approach comports with those employed by our sister circuits when reviewing brief orders. *See, e.g., De Quan Zheng v. U.S. Dept. of Justice*, 200 Fed.Appx. 66, 67 (2d Cir. 2006) ("Where, as here, the BIA affirms an IJ's decision by "brief order" pursuant to 8 C.F.R. § 1003.1(e)(5), we review the IJ's decision directly along with any supplemental reasoning provided by the BIA.").

petitioner's proffered employment history is rife with inconsistencies.[2] His motive for acquiring a passport and visa are similarly central, but the petitioner cannot reconcile the story he told in his application for asylum with the date of issue clearly inscribed on his passport.[3] These discrepancies constitute substantial evidence. Especially when taken together, they are more than sufficient to support the IJ's adverse credibility finding.[4] *See Singh v. Gonzales*, 439 F.3d 1100, 1108

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[2] The petitioner's supporting documents contain no less than six different names, two different street addresses, two different postal codes, and three different phone numbers – all purportedly belonging to the same company. The majority is technically correct that the IJ never mentioned these specific inconsistencies; rather, based on the "discrepancies within the documentation itself," the IJ concluded that *all* of these documents were probably fake.

[3] In his application, the petitioner claims to have obtained his passport after he was arrested and tortured in March 2001, but the passport was issued in January 2001. Perhaps realizing his mistake, the petitioner changed his story and testified at his removal hearing that he originally acquired his passport for the purpose of visiting his son in Russia. The IJ's adverse credibility determination contains the following summary of this amended tale:

> The respondent states that he received his passport to come to the United States two months prior to any of his arrests or persecution, because he wanted to go visit his son in Russia for study purposes. When the respondent was successful in obtaining his passport in January of 2001, however, he did not go visit his son. He, instead, chose to come to the United States.

[4] Additionally, the IJ cited inherent implausibilities in the petitioner's testimony, a lack of readily available corroborating evidence, and the incredible

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(9th Cir. 2006) (a single supported ground for an adverse credibility determination is sufficient if it goes to the heart of the claim).

The majority disregards these incongruities because they were not cataloged by the BIA in its two-page brief order, and because the BIA's order does not "expressly adopt" or "expressly incorporate" the IJ's opinion. To support this proposition, the majority cites our inapposite opinions in *Andia v. Ashcroft* (reviewing denial of motion to re-open) and *Plasencia-Ayala v. Mukasey* (appeal from *de novo* review by BIA three-member panel), neither of which deals with an adverse credibility finding.

In this case, the BIA's order reads in relevant part:

> We agree with the outcome reached by the Immigration Judge. The respondent has failed to meet his burden of credibly showing past persecution and a reasonable possibility of suffering persecution on account of a protected ground if removed to China. In this regard, we note that the respondent failed to satisfactorily establish the source of a letter from Li Bai where the addresses provided on her resident identification card and accompanying envelope are not consistent.

(internal citations omitted). While this language is no model of clarity, the BIA's intent to adopt the IJ's credibility determination cannot reasonably be disputed – irrespective of whether the BIA ever uttered the magic word "adopt" or referenced

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contents of supporting affidavits (a conclusion which she supported by referencing the country report).

by name its decision in *Burbano*. Indeed, the petitioner's own lawyer conceded at oral argument that the BIA had "essentially adopted the Immigration Judge's findings and then added their own." Where "the BIA appears to have adopted the IJ's reasons for h[er] negative credibility finding, we look to the IJ's decision for further guidance as to the basis of the BIA determination." *Garrovillas v. I.N.S.*, 156 F.3d 1010, 1014 (9th Cir. 1998). I would do so here, and because my review of the record fails to compel me to the conclusion that the petitioner *is* credible, I would deny the petition.